IN THE

Supreme Court of the United States.

OCTOBER TERM, 1941.

No. 798.

THE SIOUX TRIBE OF INDIANS, PETITIONER,

v.

THE UNITED STATES.

On Writ of Certiorari to the Court of Claims.

REPLY BRIEF FOR THE SIOUX TRIBE OF INDIANS, Petitioner.

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Comes now the petitioner, by counsel, and submits the following reply to the brief filed in this case by respondent, The United States.

RESPONDENT'S "QUESTIONS PRESENTED."

The respondent has assumed to restate the questions presented in the petition for certiorari herein. The questions presented by respondent, if considered, are objected to as follows:

1. No question of "ownership" is involved in this case, as stated in respondent's questions No. 1 and No. 2 (p. 2). The grant to petitioner was the *use* of the lands, not the ownership. "Ownership" implies a broader title and includes the right of alienation. This the Indians did not have, but there was granted to the Sioux Tribe, petitioner, the right to the use of the land. The land was attached to the Sioux permanent reservation of 1868 "as a part thereof."

2. The question of the "agreement of 1876" referred to

in respondent's question No. 3 (p. 2) is not in the record before this Court. As petitioner will show, there was no "agreement of 1876" between the United States and the Sioux Tribe of Indians. Further discussion of this matter will be found at a later point in this brief.

RESPONDENT'S STATEMENT AND ARGUMENT.

To avoid repetition petitioner deals with respondent's statement of the case and respondent's summary and argument on the questions presented by the petition on which writ of certiorari was granted herein.

The statement of the case by respondent contains assumptions and misstatements and conclusions hereinafter noted.

The summary of argument and argument contain similar matters to which the petitioner objects.

The brief of respondent divides its summary and the argument into three principal divisions: Section 1 relates to the power of the President to create or expand Indian reservations by Executive Order. Section 2 relates to the quantum of title obtained by petitioner under the Executive Orders of 1875–1876 and the liquor traffic. Section 3 relates to the alleged agreement of 1876.

THE POWER OF THE PRESIDENT TO ISSUE THE EXECUTIVE ORDERS.

In dealing with the power of the President to issue the Executive Orders here in question the respondent has made reference to a letter dated March 23, 1875, signed by the Commissioner of Indian Affairs (R. 10). A portion of that letter is requoted in respondent's brief (p. 6) and contains the following statement: "This order does not affect existing rights of any persons resident within the limits of the territory withdrawn,—"

No Executive Order affecting public lands nor any act of Congress has ever assumed to take from bona fide settlers on the public domain rights which they had previously acquired under the public land laws. The implication apparently relied upon by respondent is that, by reason of the statement made by the Commissioner of Indian Affairs, the Executive Orders

granted something less than appears on the face of the Executive Orders.

Again in the same quotation it is apparent that the respondent relies on the following:—"nor is it supposed that the withdrawal will be made permanent,—" On its face this is a supposition and an opinion by the Commissioner of Indian Affairs.

The legal effect of the Executive Orders of 1875 and 1876 is for this Court to determine. The opinion of Government officials and suppositions by the respondent are not controlling.

No where in respondent's brief does respondent say that the President did not have the power to issue the Executive Orders of 1875–1876. In fact, the respondent admits that the orders were effective and granted to the Sioux Tribe, petitioner, the right to the use of the lands covered by the said Executive Orders.

The respondent on page 10 denies that the President had the right to alienate permanently the beneficial ownership of the land here in question. That is an adroit misstatement of the question before the Court. First, there is no such thing as a "permanent disposition" of public lands, either by the President or by the Congress. At all times the sovereign power of the United States holds the basic title. Secondly, there is not in this case the question of the "beneficial ownership." The grant to the Sioux Tribe, petitioner, was the use of the land. As previously stated the Tribe had the use of the land but did not have all of the elements of ownership, hence the question of "ownership" is not before the Court.

The respondent admits that the orders were issued and were effective to deliver over to the Sioux Tribe, petitioner, the use of the land.

On page 10 of respondent's brief appears the following:

> "Consequently, the four orders here involved undoubtedly were effective to set aside the described 'Indian Country' or as an 'Indian Reservation,' for so long as the orders were unrevoked."

On page 20 the respondent says as follows:

> "The lands set aside by executive orders for the use of the Sioux as additions to the permanent treaty reservation were, therefore, lawful reservations, during the period in which the executive orders were effective."

The additions by the Executive Orders to the permanent reservation were made under and in comformity with the Treaty of 1868 and in the exact words of that treaty which provided for extensions to the permanent reservation. The terms used in the Treaty are general;—"or in such territory as may be added to this reservation for the use of said Indians." (Art. 2, Treaty of April 29, 1868, 15 stat. 635.) As the President theretofore, then and thereafter had exercised the power of creating or enlarging Indian reservations by Executive Order and as he did issue the Executive Orders of 1875 and 1876 and as the Courts and the Congress have directly or indirectly confirmed or ratified his acts in this respect, then the Executive Orders of 1875 and 1876 were issued by due authority, in the words and in conformity with the Treaty of 1868.

Petitioner has shown definitely that the Executive Orders of 1875 and 1876 were issued exactly in the terms of and under and in accordance with the Treaty of April 29, 1868 (15 Stat. 635).

Further, on page 13 of respondent's brief reference is made to the Treaty of 1868, *supra*, in the following language:

> "This agreement bars any claims to beneficial ownership upon the basis of aboriginal use and occupation."

In reply petitioner calls attention to the record and to petitioner's brief. The Treaty of 1868 anticipated and foresaw the probability that additions would be made to the permanent reservation created by that treaty. A substantial portion of the Sioux Tribe, the Upper and Lower Yanktonai bands were then living on the east side of the Missouri River. These bands were induced to execute the Treaty of 1868 by a promise made by the Treaty Commissioners that the Commissioners would do all within their power to have the permanent reservation extended to "the James River country." The Upper and Lower Yanktonai bands continued to live in the country

east of the Missouri River after the Treaty of 1868 was ratified by the Senate. These two bands of the Sioux Tribe continued in the use and occupation of the area here in question.

We therefore have the following:

A permissive use and occupation founded on aboriginal use and occupation; coupled with a promise to endeavor to have the permanent reservation extended to the James River; coupled again with the Executive Orders of 1875 and 1876. This chain makes the aboriginal use and occupation continuous and uninterrupted and finally recognized by the Executive Orders of 1875 and 1876.

The respondent at page 16 again refers to the *Midwest Oil* case and says that the decision therein does not "hold that the President had power to grant irrevocable title to the Indians." There is no such thing as an irrevocable title in our law. The Executive Orders here in question not only could be revoked but actually were revoked by the Executive. The Congress might have done the same. The question here is not on the power to revoke the Executive Orders but the question is on the taking from the Sioux Tribe, petitioner, by the revocation of the Executive Orders of 1875, 1876 of the property rights of the petitioner.

The respondent at page 22 refers to the Act of March 3, 1927 (44 Stat. 1347) in the following language:

> "Finally, the Act of March 3, 1927, c. 299, Sec. 4, 44 Stat. 1347, provided that changes in the boundaries of executive order reservations should not be made except by Act of Congress."

This act is a supplement or following act to the Act of June 30, 1919 (41 Stat. 3, 34), which was cited and relied upon in petitioner's brief (p. 17).

The Act of March 3, 1937, not only prevented the extension of Indian Reservations previously established by Executive Orders but the act prohibited the reduction of such reservations by such Executive Orders. Both by the Act of 1919 and the Act of 1927 the Congress has recognized the practice of the President to create Indian reservations or to expand Indian

reservations by Executive Orders and in so doing confirmed the previous existence of the power of the President.

There were, as stated in *Midwest Oil* v. *United States* and as appears from the briefs in this case, a large number of Executive Orders which created or enlarged Indian reservations. We have, we submit, fully established the power of the President to issue the orders. We have also established that the orders were effective to deliver over to the Indian Tribes covered by the orders whatever rights and privileges, whatever use or occupation, or whatever title which each separate particular Executive Order recited and set out on the face of each such order.

The petitioner is not here engaged in an endeavor to analyze each and every one of the "99 executive orders establishing or enlarging Indian Reservations" referred to by the Court in *Midwest Oil* v. *United States.* The petitioner, however, does contend that the Executive Orders adding land to the Sioux permanent reservation of 1868 by the Executive Orders of 1875 and 1876 were, as stated in petitioner's brief, made in conformity with the treaty (Treaty of April 29, 1868); that the said Executive Orders contained no words of limitation on the duration of the Executive Orders; that by those Executive Orders the petitioner obtained, as by a grant, the definite right to the use and occupation of the land in question; that this right was a property right and a thing of value.

QUANTUM OF TITLE OBTAINED BY PETITIONER AND THE LIQUOR QUESTION.

Answering the second principal division of respondent's statement and argument (pp. 35–42), the question of the quantum of title obtained by the petitioner is necessarily covered in the foregoing portion of this brief.

We have shown that the petitioner did not obtain an absolute, irrevocable ownership of the land here in question, but obtained the use of the land and did have at the time the orders were issued and thereafter the actual occupation of the land. The respondent contends that the sale of liquor was the sole

and only reason for the issuance of the Executive Orders of 1875–1876. The respondent would have the Court read the Executive Orders of 1875–1876 "in the light of the peculiar circumstances requiring their issuance" (respondent's brief, p. 16).

The words "in the light of the peculiar circumstances requiring their issuance" is an assumption not borne out by the record. There were various reasons for the issuance of the Executive Orders: An inducement to sign the Treaty of 1868; a provision of the treaty itself anticipating an extension of the permanent reservation; the acquiescence of the United States in the continued occupation of the lands east of the Missouri River by the Sioux Tribe; the continuing agency service by the United States to the Sioux east of the Missouri River; the recommendation of Agent Swan for the establishment of an agency east of the Missouri River (all discussed in petitioner's brief) all of which are disregarded by the respondent, whose faith is pinned to the unsound liquor question.

It can not be held that the liquor question was the sole and only reason, even though respondent has persistently insisted that the liquor question was the sole and only reason for the issuance of the Executive Orders.

Apparently the respondent has abandoned the theory that by the error contained in the code of 1873, referred to in petitioner's brief, pages 24, 25, 26, the liquor dealers could not be prosecuted. To this extent the respondent has also abandoned the decision of the Court below. (See specification of error No. 7, petitioner's brief, p. 12.)

Since the respondent has abandoned the technical question of the error contained in the code of 1873, which error did not affect the prosecution of the liquor dealers, there still remain several reasons hereinbefore set out in detail and set out in petitioner's brief, which were the sound basis for the issuance of the Executive Orders of 1875–1876, and further there remains the controlling reason for the issuance of the Executive Orders of 1879 and 1884 which took these lands from the Sioux Tribe, petitioner, and restored the lands to the public domain.

The respondent has wholly failed to answer, and in fact has made no reference, whatsoever, to the real reason for the

Executive Orders of 1879 and 1884 restoring the lands in question to the public domain. Having been completely ignored as to this very important matter we do not feel at liberty to restate the reason for the orders of 1879, 1884 except to say—petitioner's brief in this case sets out in full the real reason for the taking of these lands from petitioner by the United States and the restoration of the lands to the public domain (petitioner's brief pp. 26–27).

ALLEGED AGREEMENT OF 1876.

The third question presented by respondent relates to and sets up the alleged agreement of 1876 between the Sioux Tribe and the United States. The respondent says in its brief (p. 8):

> "Between September 23 and October 27, 1876, with a full understanding of the condition imposed by the Act of Congress, the various bands of Sioux signed an agreement, which was ratified by the Act of February 28, 1877, 19 Stat. 254 (R. 19)."

The Act of February 28, 1877, *supra*, took from the Sioux Tribe, not by agreement but by force of the act, all of the Sioux territory west of the 103rd meridian and the forks of the Cheyenne River. That confiscation of the lands of the Sioux Tribe is now in litigation between that Tribe and the United States in the case pending in the Court of Claims, No. C–531–(7), the Black Hills.

The legal effect of the Act of February 28, 1877, has not yet been decided. The Sioux Tribe in the Court below denies, in that pending case, that an agreement was ever entered into respecting the western and northern boundaries of the Sioux permanent reservation. Petitioner regards the injection of the Act of February 28, 1877, into the case at bar as inappropriate and as an attempt on the part of respondent to pre-try a case pending in the Court below.

There is, however, a more definite reason why the Act of February 28, 1877, has no application here. That reason is that the act itself relates only to the western and northern boundaries of the Sioux permanent reservation of 1868. The act, which is

set out in part in appendix D to respondent's brief (pp. 58,59), by its terms relates only to the northern and western boundaries of the permanent reservation as diminished by the act itself. No reference is made in the Act to the eastern boundary of the permanent reservation of 1868, i. e., either the eastern bank of the Missouri River or the 99th meridian of longitude west of Greenwich.

Respondent represents to this Court that the Act of February 28, 1877, took also from the Sioux Tribe the lands between the Missouri River and the 99th meridian west of Greenwich. This request by respondent is erroneous in the face of the fact that the act itself does not relate to the eastern boundary of the Sioux permanent reservation as extended by the Executive Orders here in question; and in the face of the further fact that the lands between the Missouri River and the 99th meridian, W., were not opened to homestead settlement and entry and still remained in the use and occupation of the Sioux Tribe until the Executive Orders of 1879 and 1884, taking the lands here in question, were issued by the Executive.

If the eastern boundary of the Sioux reservation was changed in any way by the Act of February 28, 1877, then certainly no Executive Order was required to restore the lands between the Missouri River and meridian 99° west of Greenwich to the public domain. The Court will take notice, however, that lands west of the 103d meridian and the forks of the Cheyenne River (the western boundary of the permanent reservation as diminished by the Act of February 28, 1877) were opened to settlement and entry by the Act of February 28, 1877, and particularly including the great Black Hills area, fabulously rich in gold, rare minerals and timber.

All these matters in regard to the Act of February 28, 1877 (*supra*),—the loss occasioned to the Sioux Tribe by reason thereof,—the question of the Tribe's right to recover, are still pending before the Court of Claims.

The absence in the Act of February 28, 1877, of any reference to the eastern boundary of the reservation, whether as to the Missouri River or 99° west of Greenwich, is so plain and so obvious that even the Court below disregarded this argument, but finding it here again counsel can only conclude that the

reference to this act is an attempt by respondent to pre-try and to have pre-judged the legal effect of the act of February 28, 1877.

On page 47, in the concluding paragraph of respondent's brief, appears a reference to the Act of March 2, 1889 (25 Stat. 888). This is the first and only reference to that Act made by respondent. This reference might be dismissed as a "last hope," all other defenses having failed.

Petitioner, however, does not overlook the reference, but calls to the Court's attention these facts:

There is no such thing as a ratification of a finality. The taking by the United States from the Sioux Tribe, petitioner, by the Executive Orders of 1879 and 1884 was a finality. Nothing remained to be said or done until the Congress by the Act of June 3, 1920 (41 Stat. 738), gave petitioner herein the right to bring this suit. There is no release in the Act of March 2, 1889, nor any words which purport to be a release of the rights of the Sioux Tribe in the land involved in this, the case at bar. There does not appear any quotation from the Act of March 2, 1889, in respondent's brief nor in the appendix.

However, should this Court decide that the lands here in question were in fact and in law opened to settlement under the Act of March 2, 1889, *supra*, petitioner would be quite content with that decision as final.

The respondent, by injecting the Act of March 2, 1889, *supra*, has invited an outcome it knows not of, but petitioner does not seek to take advantage of respondent. The Act of March 2, 1889, *supra*, provides for the payment by the United States for all lands ceded by the said act at fixed rates; all such sums to bear interest at a fixed rate from and after the dates of disposition of the lands.

CONCLUSION:

We submit that there is established by the record and our briefs the following:

1. The President had and exercised the power to issue the Executive Orders of 1875–1876.
2. Those orders were effective to set over to the Sioux Tribe an interest in the lands involved.
3. That interest was a private property right, a thing of value, to the Sioux Tribe.
4. The taking of that interest by the United States was in the exercise of the sovereign power of eminent domain, and

Therefore the Sioux Tribe, petitioner, is entitled to just compensation for the private property so taken.

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